Bumiputra Commerce v Tengku Ngah Putra bin Tengku Ahmad Tajuddin & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO MT1 24-1022 OF 2001
SURIYADI J
10 AUGUST 2002

Land Law *— Charge — Notice of demand — Application for public auction — Failure to pay monthly instalments — Failure to comply with the demand notice and Form 16D notice — Whether chargor proved to the court that the chargee had no right to the sum in the originating summons — Whether there was unconscionable enrichment on the part of the chargee contrary to equity which was sufficient to reject the application — Whether there exists cause to the contrary — What constitutes cause to the contrary — National Land Code s 256(3), Form 16D*

The defendants (chargors) had mortgaged a piece of property ('the said land') in exchange for a bank loan of RM93,112.98 offered by the plaintiff (chargee). The offer was made vide a letter dated 11 November 1995, subject to interest of 1.7% above the base lending rate of the plaintiff (chargee). The defendants (chargors) had subsequently failed to pay up the monthly instalments, resulting in the issuance of a demand notice. The defendants failed (chargors) to comply with the notice and a Form 16D notice pursuant to the National Land Code ('the Form 16D notice') was subsequently issued. Originating summonses were filed against them, praying for the balance of the principal sum together with interest and an accrued sum of RM49,540.16 as from April 2001 and increasing. The parties had agreed to narrow down the issues to merely focus on the defendants' (chargors) defence of whether there was 'cause to the contrary' that would oblige the court to reject the application for a public auction. There were only two intertwined grounds ventilated by the defendants (chargors), viz the wrongful computation of interest and the non-compliance of the condition precedents provided for in the main agreements by the plaintiff (chargee).

Held, dismissing the application:

(1) It is trite that in order to deny the public auction of any property, a chargor will have to prove to the court that the chargee has no right to the sum in the originating summons. It has to prove that cause to the contrary was in existence, inter alia, by exposing the flaw in the Form 16D notice sent to it, the very foundation of the originating summons (see p 67C–D).

(2) On the understanding of the current facts, read together with the views formulated in *Low Lee Lian v Ban Hin Lee* [1997] 1 MLJ 77, any granting of an order of sale would certainly be wrong here. As the plaintiff (chargee) was not entitled to the additional interest, obtained through unconscionable enrichment, it thus was not

entitled to that extra payment. Just on that substantive premise, the notice of demand had become flawed, further to be repeated in the impugned Form 16D notice, thus making it ineffectual and invalid (see p 68G–I). Apart from the issue of the non-compliance with a procedural requirement, there was also the issue of unconscionable enrichment on the part of the plaintiff (chargee), which was contrary to equity. One ground would have been sufficient to reject the application, let alone two (see p 69A).

[Bahasa Malaysia summary

Defendan-defendan (penggadai-penggadai) telah menggadai sebidang harta ('tanah tersebut') untuk ditukarkan dengan satu pinjaman bank sebanyak RM93,112.98 yang ditawar oleh plaintif (pemegang gadaian). Tawaran tersebut dibuat menerusi sepucuk surat bertarikh 11 November 1995, tertakluk kepada faedah pada kadar 1.7% di atas kadar asas pinjaman plaintif (pemegang gadaian). Defendan-defendan (penggadai-penggadai) kemudiannya gagal membayar bayaran ansuran bulanan, yang mengakibatkan pengeluaran satu notis tuntutan. Defendan-defendan (penggadai-penggadai) gagal membayar mematuhi notis tersebut dan satu notis Borang 16D menurut Kanun Tanah Negara 1965 ('notis Borang 16D') kemudiannya dikeluarkan. Saman pemula telah difailkan terhadap mereka, memohon baki jumlah prinsipal bersama faedah dan jumlah terakru sebanyak RM49,540.16 mulai April 2001 dan semakin bertambah. Pihak-pihak telah bersetuju membataskan isu-isu untuk menumpu pada pembelaan defendan-defendan (penggadai-penggadai) sahaja mengenai sama ada wujudnya 'sebab bertentangan' yang mewajibkan mahkamah supaya menolak permohonan lelong awam. Cuma terdapat dua alasan berjalinan yang dibentangkan oleh defendan-defendan (penggadai-penggadai) iaitu pengiraan salah faedah dan ketidakpatuhan syarat-syarat terdahulu yang diperuntukkan dalam perjanjian utama oleh plaintif (pemegang gadaian).

Diputuskan, menolak permohonan tersebut:

(1) Adalah mantap bahawa untuk membatalkan lelong awam ke atas mana-mana hartanah, pihak yang mencagar hendaklah membuktikan kepada mahkamah bahawa pemegang gadaian tidak berhak menerima jumlah dalam saman pemula. Ia harus membukti bahawa wujudnya sebab bertentangan, antara lain, dengan mendedahkan ketidaksempurnaan dalam notis Borang 16D yang dihantar kepadanya, yang merupakan asas saman pemula (lihat ms 67C–D).

(2) Berdasarkan persefahaman fakta-fakta semasa, dibaca bersama pendapat-pendapat yang dirumuskan dalam *Low Lee Lian* v *Ban Hin Lee* [1997] 1 MLJ 77, sebarang kelulusan perintah jualan

A sememangnya salah di sini. Oleh kerana plaintif (pemegang gadaian) tidak berhak diberikan faedah tambahan, yang diperolehi melalui keuntungan keterlaluan, justeru itu ia tidak berhak mendapat bayaran tambahan tersebut. Atas dasar substantif itu sahaja notis tuntutan itu tidak sempurna, yang kemudiannya diulangi dalam notis Borang 16D, justeru itu B menyebabkannya tidak berkesan dan tidak sah (lihat ms 68G–I). Selain daripada isu ketidakpatuhan keperluan menurut prosedur, terdapat juga isu keuntungan keterlaluan pada pihak plaintif, yang bertentangan dengan ekuiti. Satu alasan sahaja sudah mencukupi untuk menolak permohonan tersebut, apatah lagi dua (lihat C ms 69A).]

Notes

For cases on notice of demand, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1920–1938.

D

Cases referred to

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (refd)
Kheng Soon Finance v MK Retnam Holdings Sdn Bhd & Ors [1983] E 2 MLJ 384 (refd)
Low Lee Lian v Ban Hin Lee [1997] 1 MLJ 77 (refd)
Murugappa Chettiar v Letchumanan Chettiar [1939] MLJ 296 (refd)
Southern Bank Bhd v Chuah Beng Hock [1999] 5 MLJ 206 (refd)

F **Legislation referred to**

National Land Code s 256(2), (3)
Rules of the High Court 1980 O 83 r 3

Jagdeep Kaur (Aziz & Mazlan) for the plaintiff.
G *Burhanudeen Abd Wahid (Burhan & Clemons)* for the defendant.

Suriyadi J: The defendants, owners of a piece of property registered as PT 14076, HS(D) 62071, Mukim of Damansara, District of Klang, Negeri Selangor Darul Ehsan ('the said land'), had mortgaged it in exchange for a bank loan of RM93,112.98 offered by the plaintiff. The offer was made vide H a letter dated 11 November 1995 ('AKH-1'), subject to interest of 1.7% above the base lending rate ('BLR') of the plaintiff bank. A mortgage memorandum dated 16 December 1996 was subsequently registered on 27 December 1996.

According to the plaintiff, the defendants subsequently failed to comply with the agreement as they had failed to pay up their monthly instalments, I resulting in the issuance of a demand notice dated 27 May 2000 to the defendants ('AKH-3'). Despite having received that notice, the defendants failed to comply with it, to be followed by a Form 16D notice pursuant to

the National Land Code ('the Form 16D notice'). In similar fashion, the defendants refused to comply with that Form 16D notice. Pursuant to O 83 r 3 of the Rules of the High Court 1980, the originating summonses were filed against them, praying for the balance of the principal sum (out of RM93,112.98) together with interest at 8.55%pa. Apart from the balance sum, an accrued sum of RM49,540.16 as from 6 April 2001 and increasing, was also demanded. The gross figure demanded in the originating summons at that point of time was RM129,937.

Before the hearing began, parties had agreed to narrow down the issues, and merely focus on the defendants' defence of whether there was 'cause to the contrary' that would oblige me to reject the application of public auction. Section 256(2) and (3) of the National Land Code read:

> (1) ...
>
> (2) Any application for an order for the sale under this Chapter by a chargee of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> (3) On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

The Federal Court in *Kheng Soon Finance v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 had also occasion to say at p 388:

> It is clear that notwithstanding the proof of default by a chargor the chargee is not automatically entitled to an order for sale nor would the court without scrutiny allow the application. The court must decide whether there are *circumstances in the case* before it which would amount to a 'cause to the contrary' *within the meaning of sub-s (3)* which would be sufficient in its opinion to refuse the chargee's application although the charge is lawfully and validly created *and the charger's default is proved.* (Emphasis added.)

There were only two intertwined grounds ventilated by the defendants, viz the wrongful computation of the interest, and the non-compliance of the condition precedents provided for in the main agreement by the plaintiff. The parties had agreed that under s 5(a) of the agreement, the interest was to be calculated on a monthly rest basis, at the prevailing rate of 1.75%pa above the bank's BLR. The BLR then was 7.60% pa. The bank was further entitled, as permitted by the agreement to change the BLR, hence the final figure of interest at the rate of 8.55%pa.

In the agreement, as per cl 14, conditions precedent were included, which were attached to the appendix. According to the appendix, the defendants were required to open a savings/current account with the plaintiff, and thereafter submit a standing instruction to debit that account for the monthly loan repayment. It was not disputed that as on 31 January 1997, the defendants already had opened that account in the bank, to be followed in its wake by the necessary standing instruction on 12 September 1997. To reiterate, and in addition to, the agreement was executed on 27 November 1995 and from that date until the standing instruction was given, the stipulated monthly payments were dutifully made by the

A defendants but by some other mode.

Come the standing instructions day, the defendants stopped all payments. Thereafter, the defendants reasonably assumed that the standing instructions were being carried out by the plaintiff, and thus left matters at that. As far as they were concerned, they had fulfilled their part of the B bargain. Unfortunately, as admitted by the plaintiff's counsel, the plaintiff was negligent and had failed to make the necessary deductions. As a result of that negligence, apart from the principal sum remaining unchanged, minus what was paid earlier before the standing instruction was submitted, the interest accumulated. Due to this accumulation, when before they were only required to pay RM93,112.98, now together with the accumulated C interest they were lumbered with RM129,937, certainly a larger sum vis-a-vis the original loan.

In terms of the law, it is now trite that in order to deny the public auction of any property, a chargor will have to prove to the court that the chargee has no right to the sum in the originating summons. In a gist, it has D to prove that cause to the contrary was in existence, inter alia, by exposing the flaw in the Form 16D notice sent to it, the very foundation of the originating summons. The chargor could expose that flaw in the like of establishing the fact that the chargee was making demands for payments which it was not entitled to (*Co-Operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283).

E

In this current case, it could not be denied that due to the exigencies and requirements of the defendants, they had accepted the loan facilities offered by the plaintiff. Certainly before the offer was made by the plaintiff, the latter must have made a thorough study of the defendants' background, culminating with compromises and the execution of the agreement. F Discussions between the parties must have been the order of the day, as it would be financially illogical for any bank, in this case the plaintiff, to offer any loan to the borrower, unless confident of the loan repayment. After being satisfied of the defendants' capacity to repay, then only will the loan be disbursed. Sensibly too, no borrower would submit to any loan facility that must necessarily stretch his financial capability beyond endurance, and G eventually ruin him. It is no secret to anybody that unless he is a totally irresponsible person, a borrower will invariably subject himself to some budgeting exercises, and in the process, allocate a certain amount of money for the monthly repayment. Thus, the importance of the instalment amount could never be overly emphasized to a borrower, as any miscalculation or unforeseen addition will only add hardship, which will eventually derail his H capability to pay.

In this case despite the plaintiff's mistake, which would certainly be a heavy burden to this unfortunate borrower, regretfully the plaintiff still pressurized the defendants to pay up the balance sum by recalling the loan. In these recessionary times, when only the cash rich can smile, the I defendants were expected to magically come up with the lump sum of RM119,554.06 (as at the time of the demand notice), within 14 days. Where are they to dig up that kind of money in such a short span of time?

Not surprisingly they failed, hence this action. In fact, even if the bank had restructured the instalment payments based on this bloated and burdensome sum, it will be like stealing from Paul to give to Peter. The end product will be that, either the defendants' families tighten their belts to a suffocating level, or surrender their roof. If a *straw* could break a camel's back, surely an unexpected larger sum to a man immobilized by a strict budget, would be debilitating. Either way, the defendants would suffer whilst the plaintiff who is the actual culprit, will always be in a 'win-win' situation.

Let us look at the matter from a different perspective, particularly from the point of view of the plaintiff and equity. As far as the plaintiff was concerned, that mistake had enriched it with the accumulation of the interest, at the expense and without the consent of the unfortunate defendants. Now the defendants were expected to shoulder unnecessary losses which were *prejudicial* to them, through no fault of theirs (*Southern Bank Bhd v Chuah Beng Hock* [1999] 5 MLJ 206). This manner of enrichment was certainly unconscionable in the circumstances of the case and contrary to the rule of equity (*Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77). In the latter case, the Court of Appeal had occasion to enunciate, as sufficiently enumerated under 'Held', that a chargor may show cause to the contrary under s 256(3) of the National Land Code by:

i demonstrating that the charge is defeasible upon one or more of the grounds specified under sub-ss (2) and (4)(b) of the said s 256;

ii by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order of sale, such as failure to make a demand or service of a notice in Form 16D, *or that the notice demands sums not lawfully due from the charge*; or

iii *by demonstrating that its grant would be contrary to some rule of law or equity* (Emphasis added.)

The above case had adverted to the case of *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296, before enunciating the third consideration, whereat in the latter case the court had remarked at p 298:

> ... a chargor may 'show cause' *either in law or equity* against an application for an order for sale, and that the court should refuse to make an order in every case where it would be *unjust to do so*. By 'unjust', I mean contrary to those rules of the common *law and equity* ... (Emphasis added.)

On the understanding of the current facts, read together with the views formulated in Held 2 and 3 of *Low Lee Lian v Ban Hin Lee*, any granting of an order for sale would certainly be wrong here. As the plaintiff was not entitled to the additional interest obtained through unconscionable enrichment, it thus was not entitled to that extra payment. Just on that substantive premise, the notice of demand had become flawed, further to be repeated in the impugned Form 16D notice, thus making it ineffectual and invalid. With the amount indicated in the Form 16D notice being wrong, and in the circumstances of the case, a wrongful demand for payment, it would be as good as if no notice had been sent to the defendants. Apart from the issue of the non-compliance with a procedural

A requirement, there was also the issue of unconscionable enrichment on the part of the plaintiff, which was contrary to equity. If I may add, one ground would have been sufficient for me to reject the application, let alone two.

I was aware of the pragmatic views of the Court of Appeal pertaining to the breaches committed by lenders, and the desire for financial stability in the prevailing climate, but as the facts here were distinguishable, I had not shirked from deciding in favor of the borrower. I could not turn a blind eye to the poverty of professionalism on the part of such a powerful institution backed by money and the best brains, and abandon justice along the way merely to cater to the needs of the business community, at the expense of the rights of the innocent 'little man', in this case the defendants. At the end of the hearing, I had no hesitation in dismissing the application with costs.

Application dismissed.

Reported by Zahid Taib